2001

Arnold Machinery Company v. Clifford A. Prince dba Prince Construction Company and Western Surety Company Inc. : Brief of Respondent

Utah Supreme Court

John W Lowe; Brayton, Lowe & Hurley; Attorney for Appellant.
Tim Dalton Dunn; Hanson, Wadsworth & Russon; Attorney for Respondent.

IN THE SUPREME COURT

OF THE STATE OF UTAH

ARNOLD MACHINERY COMPANY, a Utah corporation,

Plaintiff-Appellant,

vs.

Case No. 14337

CLIFFORD A. PRINCE, dba PRINCE CONSTRUCTION COMPANY and WESTERN SURETY COMPANY, INC, a corporation,

Defendants-Respondents.

BRIEF OF RESPONDENT WESTERN SURETY COMPANY, INC.

APPEAL FROM JUDGMENT
of the
DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
Honorable Bryant H. Croft

JOHN W. LOWE, ESQ.
BRAYTON, LOWE & HURLEY
1011 Walker Bank Building
Salt Lake City, Utah 84111

ATTORNEYS FOR APPELLANT

TIM DALTON DUNN, ESQ.
HANSON, WADSWORTH & RUSSON
702 Kearns Building
Salt Lake City, Utah 84101

ATTORNEY FOR RESPONDENT, WESTERN SURETY COMPANY, INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE CITATIONS

STATUTES AND RULES CITED

IN THE SUPREME COURT OF THE

STATE OF UTAH

ARNOLD MACHINERY COMPANY, a Utah corporation,	:	
Plaintiff-Appellant,	:	
vs.	:	Case No. 14337
CLIFFORD A. PRINCE, dba PRINCE CONSTRUCTION COMPANY and WESTERN SURETY COMPANY, INC, a corporation	:	
Defendants-Respondents.	:	

BRIEF OF RESPONDENT
WESTERN SURETY COMPANY, INC.

STATEMENT OF THE KIND OF CASE

This is an action brought by the Arnold Machinery Company to recover, under a rental agreement, rental and attorney's fees, arising out of the rental of earth moving equipment from a sub-contractor on a federal government project and its bonding company.

DISPOSITION IN THE LOWER COURT

In July of 1975, both the plaintiff-appellant and

the defendant-respondent filed motions for summary judgment. Plaintiff-appellant, Arnold Machinery's motion was for a partial summary judgment, not including the question of damages. Defendant, Western Surety's Motion was for a full summary judgment. Both motions were argued on August 12, 1975 before the Honorable Bryant H. Croft. On August 26, 1975, Judge Croft handed down a memorandum decision granting Western Surety Company's motion for summary judgment and denying Arnold Machinery's motion. (R. 73, 74 and 75). An Order and Summary Judgment was signed on September 16, 1975 by Judge Croft (R. 76 and 77).

Thereafter, the plaintiff Arnold Machinery filed an Amended Complaint, pursuant to a stipulation with counsel for the defendant Clifford A. Prince, dba Prince Construction Company; in which allegations against Western Surety continued to be present. On the 30th day of October, 1975, the plaintiff filed a Motion for Summary Judgment against Clifford A. Prince, dba Prince Construction Company, and the same was granted, and a judgment entered in favor of the plaintiff and against Clifford A. Prince for the rental and attorney's fee, after hearing on November 12, 1975. Plaintiff Arnold Machinery

seeks a reversal of Judge Croft's Order Granting Summary Judgment in favor of Western Surety against Arnold Machinery Company.

RELIEF SOUGHT ON APPEAL

Respondent, Western Surety Company seeks an affirmance of the Order of the District Court granting summary judgment in favor of the defendant-respondent, Western Surety Company, or in the alternative, a ruling that the plaintiff-appellant's only action is in the Feberal Courts.

STATEMENT OF FACTS

Plaintiff first commenced its action on the 31st day of October, 1974, in the United States District Court for the District of Utah, Central Division in Case No. C-75-337. That action was entitled United States of America for the use and benefit of Arnold Machinery Company, Inc., a corporation, Plaintiff, vs. Clifford A. Prince dba Prince Construction Company, R. D. Tolman Construction Company, Inc., a Utah corporation; Western Surety Company, Inc., a corporation; and Transamerica Insurance Company, Defendants. Answers were filed by all defendants. In the Complaint in that action it was

alleged that: "The last material was furnished on October 30, 1973." In that action Tolman cross-claimed against Western Surety on its bond written in favor of Tolman bonding Clifford A. Prince, dba Prince Construction Company. Approximately seven (7) months later, on the 22nd day of May, 1975, that case was dismissed, without prejudice, upon a stipulation and agreement of all counsel. On the 19th day of May, 1975, plaintiff initiated this action in the Third District Court, Salt Lake County, State of Utah; not including the previous defendants R. D. Tolman Construction Company and the Transamerica Insurance Company.

The R. C. Tolman Construction Company was the general contractor for the construction of the Fish Lake Sanitation System for the U. S. Forest Service at Fish Lake, Utah. As such, it was involved in construction of a roadway in lagoons on federal lands and subject to the requirements of the Miller Act, 40 USCA 270 (a). Clifford A. Prince, dba Prince Construction Company was a sub-contractor on the project in the heavy equipment and earth moving area. (See paragraphs 1, 2 and 3 of Complaint, R. 2, Paragraph 1 of the Answer to Complaint of Prince, R. 6 and Answer to Request for Admissions of Prince, R. 48 and 49.)

Tolman, as general contractor for a construction project on federal lands and for the United States Government was required by the Miller Act, supra., to furnish a performance and payments bond to the United States of America. That bond was involved in the earlier action in the Federal Court, though that aspect of the action was dropped when the instant case was filed. Tolman by its sub-contract required Prince to supply Tolman with a contract bond, which it did through the Western Surety Company. A copy of that bond is on file with the Court attached to the affidavit of John W. Lowe (R. 42, 43 and 44). That bond makes Prince, as principal, and the Western Surety Company, as surety, "firmly bound unto R. C. Tolman Construction Company, Inc., 130 North 600 East, Centerville, Utah, hereinafter called the obligee, ..." Western Surety Company is bound to Tolman, and Tolman alone is listed as and called the "Obligee".

Arnold Machinery, in its Complaint, alleged that Prince Construction rented equipment from Arnold Machinery and failed or refused to pay the agreed rental price. Arnold provided such equipment, or materials up to and through October 30, 1973. See plaintiff's Request for Admissions,

and the Answers thereto (R. 48 and 49). The Complaint in this action was filed more than a year and a half thereafter, on the 19th of May, 1975.

After some discovery, the plaintiff, Arnold Machinery made a motion for partial summary judgment and the defendant Western Surety made a motion for summary judgment. Plaintiff's motion was based on its assertion that the action was not limited by a one year limitation, that the state courts have proper jurisdiction and that Arnold was a third-party beneficiary on the bond and therefore a real party in interest.

Both parties filed memoranda in support of their positions. Western Surety argued that the Arnold Machinery Company's claim was barred on three (3) grounds. Its memorandum set those forth as follows:

> In the first place the defendant, Western Surety contends that the action must be brought in the Federal Court. Secondly, the cause of action of the plaintiff is barred, even by state law. Thirdly, the bond in question, which was made a part of the record, runs to the Tolman Construction Company for the purpose of reimbursing it for any losses it sustained as a result of a claim by materialmen or laborers". (R. 56)

Arnold Machinery Company responded to each of those points in a reply memorandum. Oral arguments were held before the Court on the 12th of August, 1975, and a Memorandum Decision was handed down by Judge Bryant H. Croft on August 26, 1975 (R. 73, 74 and 75). The Court's Memorandum Decision read as follows:

> The Court has under advisement plaintiff's motion for partial summary judgment and defendant Western's motion for summary judgment which motions were argued on August 12, 1975 with appearances as above indicated. Plaintiff's motion is based upon the contentions that the only issue remaining to be tried is what damages are owing. Defendant Western contends the action is barred by the one year statute of limitations as well as the Miller Act.
>
> Under Section 270 (b) of Title 40 USCA, it is apparent that parties furnishing materials on a job covered by the Miller Act, whether they be subcontractors or suppliers to subcontractors, have a right of action on the bond required by that Act. If their rights under the act are asserted pursuant to that statute, then the action must be filed in the federal court within the time required by that statute. However, the Miller Act does not make action under that statute the exclusive remedy to a material or labor claim for materials or services furnished on a federal project and if an unpaid materialman or laborer chooses not to sue under the act on the bond required by the United States on a federal project, he loses the benefit of the act and the pro-

tection of the bond required by the federal government but not his claim or remedy unless otherwise barred. Thus, the Miller Act is no bar to plaintiff's complaint and its one year statute of limitations is not applicable.

Plaintiff alleges that the state Mechanic's Lien laws (sec. 28-1-1 et seq.) are not applicable because Section 1 thereof specifically provides that its provisions do not apply to any public building, structure or improvement and this case involves a public improvement. Plaintiff further contends that Chapter 2 of Title 14 dealing with mechanic's and materialmen's liens on private contract does not apply because defendant Prince is not an owner but was a contractor; and that Chapter 1 of said Title relating to public contracts is not applicable because the project did not involve furnishing work for the state or any of its political subdivisions. Plaintiff thus contends that the six year statute of limitations relating to written contracts is controlling and that the action may be maintained, or that the four or three year statutes could apply instead of the one year statute set forth in Section 14-2-2.

It is my opinion that the fact that the bond required of Prince was by the general contractor Tolman, rather than by the "owner" of the land does not take the contract outside of the scope of Chapter 2, Title 14, and that contractors, sureties, materialmen and laborers all are bound to meet the requirements of sec. 14-2-1 et seq. including that of commencing the action within one year from the date the last materials were furnished or the labor performed.

> This plaintiff has not done and its motion for partial summary judgment is denied except as otherwise indicated with respect to the applicability of the Miller Act, and defendant Western's motion for summary judgment of dismissal is granted.

The Court, based upon that Memorandum Decision, entered an Order and Judgment granting Western Surety's Motion for Summary Judgment and denying the plaintiff's Motion for Partial Summary Judgment (R. 76).

ARGUMENT

Defendant Western Surety in this action contends that a number of issues interrelate in the determination of the proper forum and of the proper statute of limitations for the case. Defendant Western further contends that the relief sought by the plaintiff on this appeal is inappropriate.

Because of the nature of the arrangement between the parties, both involved in this suit and previously involved with the bond, the nature of the relationship between the parties to the suit is one which does fall under the controlling purview of the Federal Miller Act and it is further one which is bound by a one year statute of limitations regardless of its jurisdictional base. Western Surety will herein demonstrate

how the bond applies and, in turn, how relevant statutes control the situation that thus exists.

POINT I

THE RELIEF SOUGHT ON APPEAL BY THE APPELLANT IS INAPPROPRIATE.

After the Western Surety Company was granted its Summary Judgment, the plaintiff, pursuant to a stipulation (R. 80), filed an AMENDED COMPLAINT (R. 81 and 82). Thereafter the plaintiff filed a Motion for Summary Judgment against the defendant Clifford A. Prince with supportive memoranda and affidavits. That Motion for Summary Judgment was granted and signed November 12, 1975 (R. 102).

The defendant Western Surety Company was not a party to the Amended Complaint nor was it a party to the summary judgment granted by the Court in favor of the plaintiff against the defendant Clifford A. Prince.

Now, the appellant contends that the amounts found by the Court in that respect should be imposed against the defendant Western Surety Company, in spite of the fact that the Western Surety Company was not a party, at that point in time to the proceedings.

The Amended Complaint includes references to a credit memorandum which included offsets due to the defendant Prince. It had not yet been established or determined the nature of those offsets, the project they are attributable to or whether or not they fall under the purview of the bond in question. Additionally, it is the position of the Western Surety Company that attorney's fees against the Western Surety Company would be inappropriate.

Therefore, should the Court decide in favor of the appellant on the appeal, Western Surety Company would respectfully submit that the matter should be remanded to the trial court for determination on the issues between the parties which were unresolved at the time of the granting of the defendant Western Surety's Motion for Summary Judgment. At that point in time, the plaintiff had <u>not</u> made a full Motion for Summary Judgment. The question of damages was not a part of the plaintiff's Motion, and was specifically excluded.

POINT II

THE BOND IN QUESTION RUNS TO THE TOLMAN CONSTRUCTION COMPANY FOR THE PURPOSE OF REIMBURSING <u>IT</u> FOR LOSSES IT MIGHT SUSTAIN AS A RESULT OF CLAIMS BY MATERIALMEN OR LABORERS

OF THE DEFENDANT CLIFFORD A. PRINCE.

It is the position of the Western Surety Company that the characterization of the bond set forth in appellant's Statement of Facts is not entirely accurate. The bond does not guarantee "that Prince, as sub-contractor, would 'promptly pay all persons supplying labor or materials'". The language of the bond itself is controlling and it is available in the record (R. 43). The bond provides that Clifford A. Prince and the Western Surety Company "are held and firmly bound unto R. C. Tolman Company, Inc., 130 North 600 East, Centerville, Utah, hereinafter called the Obligee, . . ." The bond goes on to further provide:

> Now, therefore, the condition of this obligation is such, that if the said Principal (Prince) shall faithfully perform said contract and indemnify the said Obligee from any loss, as resulting from the breech of any of the terms and conditions thereof and shall promptly pay all persons supplying labor or material in the prosecution of the work provided for in such contract, then this obligation shall be void, otherwise to remain in full force and effect.

The Principal (Prince) agreed to "indemnify the said Obligee (Tolman) for losses Tolman might sustain". Tolman as the appellant's brief correctly sets forth was required by

the Miller Act, 40 USCA 270 (a), to furnish a performance and a payments bond to the United States of America, which Tolman furnished. Under that bond, and provisions of the Miller Act, a cause of action was afforded to laborers and materialmen that would properly and timely assert their claims. The plaintiff in this action did not timely file such a claim. The purpose of the bond running from Prince and Western Surety to Tolman was for the purpose of indemnifying Tolman and its bonding company for any losses incurred by virtue of its Miller Act obligations.

The appellant admits on page 3 of its brief that "the action was commenced slightly more than one year after the termination of the rental agreement". Thus, the claims against Tolman and Tolman's bonding company, under the Miller Act, have been abandoned. The plaintiff-appellant now attempts, through a legal subterfuge, to effectuate a bond recovery in spite of its admitted non-compliance with statutory filing requirements.

(Point of Fact. The action which was "commenced slightly more than one year after the termination of the rental agreement" was the action in the federal court. It was commenced one day after the one year termination. This

state court action was commenced 7½ months after the termination of the rental agreement.)

Under the terms of the bond, Tolman was the obligee and Tolman could recover against Clifford A. Prince and the Western Surety Company. The plaintiff-appellant missed their opportunity to recover against Tolman and its bonding company under the Miller Act. Thus, the obligee (Tolman) has no loss for which it needs to be indemnified. If Arnold had properly and timely commenced its claim (which it did not) Tolman would have had a loss for which it could legitimately and properly seek indemnification under the provisions of the bond.

The bond in this instance runs only to the obligee, Tolman. It is unlike the bonds found in the case of Oscar E. Chytraus Company, Inc. vs. Wasatch Furnace and Electric, Inc., 28 Utah 2d 339, 502 P.2d 554 (1972) which ran to "the owner and to all other persons as their interests may appear"; and it is also different from the bond in Steel Components Company vs. United States Fidelity and Guarantee Company, 28 Utah 2d 25, 497 P.2d 646 (1972), which bond was for the protection of persons supplying labor or material to the contractor or

his sub-contractor.

As is pointed out in the brief of the appellant, Tolman in this instance was required by the Miller Act to make provisions for the protection of materialmen and laborers by the filing of a Miller Act qualifying bond. The function here being performed was to provide a remedy for materialmen and suppliers in an area where mechanics' lien remedies were applicable. In the 1973 Utah case of Carlisle vs. Cox, 29 Utah 2d 136, 506 P.2d 60, the Court reasserted an observation made in an earlier case (Rio Grande Lumber Company vs. Darke, 50 Utah 114, 167 P. 241 (1917)) and observed that the bonding statute tied in with the mechanics' lien law. In the Carlisle case the Court stated as follows:

> In Rio Grande Lumber Company vs. Darke this court observed that the bonding statute was an auxiliary to the mechanics' lien law and an integral part thereof and could have been incorporated in the same chapter.
>
> Section 38-1-7, U.C.A. 1953, (Mechanics' Liens) provides:
>
> > . . . every person other than the original contractor claiming the benefit of this chapter within sixty days after furnishing the last material or performing the last labor . . . must file for record . . . a claim in writing . . ..

> Both Section 14-2-2 and 38-1-7 provide that certain affirmative actions must be taken to preserve and enforce the statutory claims thereunder within a requisite period after the last material was furnished or labor performed.

Tolman provided the plaintiff-appellant with an appropriate bonding remedy. The plaintiff-appellant failed to properly take advantage of that remedy. Now they are trying to avail themselves of a secondary and independent bond which Tolman had provided for itself should should the plaintiff-appellant or other materialmen properly avail themselves of the Miller Act bond Tolman had set up.

Appellant, in its brief, on page 19 cites the case of Deluxe Glass Company vs. Martin, et al., 116 Utah 144, 208 P.2d 1127 (1949) in supporting the proposition that a materialman may sue the surety directly. The Deluxe Glass case construed a particular bond and construed that the bond, by virtue of its language, applied to the given situation in that case. However, that bond was a bond of a general contractor given to an owner of land. That situation is akin to the circumstance and the result bond which Toleman, as general contractor, had to provide the United States of America. Additionally, the Utah Supreme Court in the Deluxe

Glass case, at page 151, made the following statement:

> It follows that should the owner be required to pay the debts in question, the surety would be liable under the bond to the owner in precisely the amount which it is, by judgment below, required to pay the creditors.

Thus, the Court considered the situation under which a remedy was available by the materialmen directly against the owner and the owner, by virtue thereof, having a remedy back against the bond of the contractor. In the instant case, the materialman has no claim against Tolman and Tolman has no claim against Prince or the Western Surety Company.

POINT III

PLAINTIFF-APPELLANT'S ONLY REMEDY, AS AGAINST BOND COVERAGE, EXISTED IN THE FEDERAL COURTS UNDER THE FEDERAL MILLER ACT.

Plaintiff admits in its brief that the project being worked upon was a United States Forest Service Project. Plaintiff further admits that Tolman as prime contractor was required by the Miller Act to furnish a performance and payment bond to the United States. Under the provisions of the Miller Act, 40 USCA 270 (a), the plaintiff-appellant

had a clear opportunity to avail itself of statutorily required bond coverage. Plaintiff-appellant in its brief admits that it failed to comply with the requirements of such coverage. As such, it is the opinion of the defendant-respondent that the plaintiff-appellants have missed their opportunity.

In the case of Glens Falls Indemnity Company vs. The United States of America for the use of Westinghouse Electric Supply Company, 229 F.2d 370 (9th Cir., 1955) portions of which are found at R. 70, 71 and 72, the United States Court of Appeals for the 9th Circuit ruled that in an action by an electrical materialman against a sub-contractor and a contractor and their bonding company that the material-man's proper remedy was against the contractor and its surety and the surety's proper remedy, in turn, was against the sub-contractor and its surety. Judgment was rendered in favor of the supplier against the prime contractor and its sureties and further in favor of the prime contractor against the sub-contractor and its sureties.

See also 117 ALR 663, annotation—subcontractors bonds—sureties liabilities, wherein it states as follows:

> As a general rule it may be stated that if the sub-contractors' bond is conditioned for the indemnification of the

> contractor for any claim of damage for which the principle contractor may be held liable and for the payment of which the sub-contractor is primarily liable, would seem that liability exists on the part of the surety on the bond of the sub-contractor to indemnify the principle contractor against any liability which may be imposed upon him or to reimburse him for any payment he may be required to make, in respect of labor and materials furnished to the sub-contractor. At page 663.

The 1954 New York case of McGrath vs. American Surety Company of New York, 122 N.E. 2d 906, held that the object of a bond given by a sub-contractor to indemnify a general contractor from liability imposed upon him by the Miller Act for non-performance and non-payment by the sub-contractor was to protect the general contractor, and not to enlarge the materialmen who were adequately protected under the Miller Act, and that, as such, a materialman had no right of action against such a sub-contractors' bond. In that decision, the Court of Appeals for New York stated as follows:

> If the order appealed from were correct, it would mean that the contractor and sub-contractor considered that the laborers and materialmen of the sub-contractor were not sufficiently protected by the Miller Act, and consequently set out to enlarge their rights by the procurement of the additional bond in suit. That is manifestly not what occurred. The rights of these

> laborers and materialmen of the sub-contractor were definitely fixed and considered to be protected adequately by the Miller Act. The object in giving the bond in suit was to protect the contractor against this very liability imposed upon him by Federal Law.
>
> This conclusion is not altered by the circumstance that the bond upon which the action is based is conditioned upon payment by the sub-contractor of its obligations to laborers and materialmen. This condition merely describes the events in which the general contractor would have recourse to the bond, if it were harassed by losses due to neglect of the sub-contractor to satisfy these obligations.

The Court went on to discuss the intention of the parties to the sub-contractor's bond and determined that it was "inconsistent with an intention that the plaintiff and others in like position should have right to sue upon it. If that intention is absent, the right to sue will be denied". The New York Court determined that the Miller Act remedy was the only remedy available to the materialmen in this instance and that the purpose of the bond given by the sub-contractor to the contractor was totally distinct. The Court so stated as follows:

> The object in having a separate payment bond—the one in suit—was to protect

> the general contractor against the contingency which would arise if the sub-contractor's performance bond were to become exhausted in completing the construction work thereby leaving the general contractor exposed to liability under the Miller Act to unpaid laborers or materialmen of the sub-contractor without indemnification.

It is the view of the defendant-respondent Western Surety Company that the fact situation in the McGrath case, supra, is extremely simular to the situation presently before the Court in the instant case.

An example of this proper functioning under the Miller Act can be found in a United States Supreme Court case of Southern Construction Company, Inc. vs. United States for the use of Samuel J. Pickard, 371 U.S. 57, 9 L.2d 31, 83 S.Ct. 108 (1962). In that case a supplier of the materials made claims against a prime contractor and his surety the Continental Casualty Company. They paid the claims of the materialmen and thereafter properly asserted those paid amounts in a counter-claim against the sub-contractor.

Another clear example of this proper procedure under the Miller Act can be found in the 1958 case of St. Paul Mercury Indemnity Company vs. Wright Contracting Company, (5th Cir.) 250 F.2d 758. In that case a prime contractor on a road con-

struction contract involving highways and public works, paid a processed bond claim. Thereafter, the contractor, and not the materialman filed suit against the bonding company of the now defunct and bankrupt contractor. The court there held that the contractors claim was properly brought against the bonding company of the sub-contractor as the bond of the sub-contractor made the general contractor the obligee and as the general contractor had suffered a loss in that it was previously obligated to honor the claim of the materialman.

The bond in question herein like those in the Federal Cases cited above, was designed to protect the contractor. It was to give him a remedy over against the sub-contractor, through indemnification (as specifically provided in the bond language) should a laborer or materialman properly and timely bring an action against the contractor and its surety under the Miller Act. In this case, Tolman has no need to be indemnified as the plaintiff-appellant Arnold Machinery Company did not properly bring its Miller Act claim.

POINT IV

THE CAUSE OF ACTION OF THE PLAINTIFF-APPELLANT IS BARRED BY THE ONE YEAR STATUTE OF LIMITATIONS.

Appellent's brief in this matter essentially takes the position that nothing applies to this fact situation. He contends that the Miller Act does not apply, Mechanics' Lien laws do not apply, and all other bond laws do not apply. Counsel for the appellant apparently takes the position that we here have a bond which is not a bond. Accordingly, he argues that none of the many bond ~~premiums~~ limitations, existant under the law, are of any weight.

The appellant again cites the case, in its brief of Rader vs. Manufacturers Casualty Insurance Company of Philadelphia, 242 F.2d 419, (2nd Cir. 1957). That case is not in point. At no point in that case is there any reference to the Miller Act. The situation that existed in that case is strongly divergent from Miller Act situations. The purpose of the Miller Act is to provide suppliers of labor and materials a remedy. It is so because no mechanics' lien is allowed against Federal Government Property, The laborer or material-man gives up his right to establish such a mechanics' lien in favor of the surety provisions imposed by the Miller Act. A point of distinction in the Rader case is whether or not the surety and indemnity "inured to the benefit of the United States".

That question is not the question which is before the Court concerning the applicability of bonds under the Miller Act. Citing the Rader case as the plaintiff does disregards substantial additional portions of federal practice and procedure.

The appellant in this brief has also quickly and cursorily discarded the significance of the Mechanics' Lien Act mentioned above. In the Carlisle vs. Cox case, supra., the Utah Supreme Court in 1973 observed that bonding statutes are auxiliary to the mechanics' lien law and an integral part thereof. Indeed the Court states that the bonding statute "could have been incorporated in the same chapter". The remedy of mechanics' and materialmen for the purpose of establishing liens on private construction. It, and the bond laws, as was pointed out by the Court, required that "certain affirmative actions must be taken to preserve and enforce the statutory claims thereunder within the representation period after the last material was furnished or labor performed". Thus, bonding privileges and the mechanics' lien law have a cooperative effect and impact.

In addition, all bond statutes contain the imposition of one year statutes of limitations. The Federal Miller Act

provides for a one year statute of limitations. The state law with reference to contractors' bonds and public contracts, found in Sections 14-1-1 to 14-1-12, U.C.A., 1953, as amended, provides for contractors' bonds on state projects much in the same fashion as the Miller Act provides for them on federal contracts, they too have a one year statute of limitations (See Section 14-1-6). Contractors' bonds in private contracts are governed by Sections 14-2-1 through 14-2-3, U.C.A., 1953, as amended. That statute also provides for the protection of laborers and materialmen, Section 14-1-1 sets out the bond conditions, and person to whom such bonds will run, and how a cause of action accrues under such a bond. Section 14-2-2 creates a liability for a person who fails to obtain a bond. Section 14-2-2 goes on to say "actions to recover on liabilities shall be commenced within one year from the last date that the materials were furnished or the labor performed". Counsel for the appellant has argued, on pages 16 and 17 of his brief, that the limitation applies to an action for failure to obtain a bond rather than to an action on a bond itself. However, the Utah Supreme Court has construed in 1972, that sentence to apply to recovery under Section 14-2-1

as well. Thus, any recovery on a contractors' bond under a private contract is governed by the one year statute of limitations. The case so deciding was the case of Oscar E. Chytraus Company, Inc., vs. Wasatch Furnace and Electric, Inc., 28 Utah 2d 338, 502 P.2d 554. In that case, the Court determined that the proper time limit for proceeding on an action against a bonding company was one year. In that case, the Court allowed the plaintiff to proceed against the United States Fidelity and Guarantee Company, which had issued a performance bond on a sub-contractor. The UMTA Credit Union contracted with Earl E. Walters to construct the building. Mr. Walters contracted with Wasatch Furnace and Electric, Inc., to provide for heating and air conditioning equipment. Oscar E. Chytraus Company sold the equipment to Wasatch Furnace and Electric, Inc., for installation in the project. In construing the statute, the Court rejected the claim of the United States Fidelity and Guarantee Company that it would reduce the time period for filing the claim against it below one year as Section 14-2-1 did not specifically establish one. In that case Section 14-2-1 was applied for the purpose of establishing the one year period. The Court in so doing stated as follows:

> However, Section 14-2-2 U.C.A., 1953 as amended provides that actions to recover on such liability shall commence within one year from the dates the last labor was performed. That provision of the statute is controlling here and the terms of the bond which would attempt to restrict the period for the commencement of the action on the bond must be regarded surplusage.

The plaintiff-appellant in this matter has argued, when discussing the application of the Miller Act, that the situation was not one concerned with federal law. Thereafter, it is argued, then analysing state provisions that it was not a state project but rather a federal project. Judge Croft, in his decision, rejected that logic.

Judge Croft ruled as follows:

> It is my opinion that the fact that the bond required of Prince was by the general contract rather than by the "owner" of the land does not take the contract outside of the scope of Chapter 2, Title 14, and that contractors, sureties, materialmen and laborers all are bound to meet the requirements of Section 14-2-1, et. seq. including that of commencing the action within one year from the date the last materials were furnished or the labor performed. (R. 75)

The respondent Western Surety Company agrees with Judge Croft in his determination that, if state laws should

apply, the contractor here steps into the issues of an "owner".

The Utah Supreme Court has had numerous occasions to review the one year time period provided for by Utah Bond Statutes and has never found them unreasonably short or harsh. See Day & Night Heating Company vs. Ruff, 19 Utah 2d 412, 432 P.2d 43 (1967); and Lister vs. Great American Insurance Company of New York, 26 Utah 2d 10, 484 P.2d 156 (1971). Indeed in the Lister case the Court applied a one year statute of limitations in a situation where the law provided that no limitation could be provided for a period of less than one year.

The agreement between Tolman and Prince requiring the filing of the bond was a private contract. It included the requirement that a bond run in favor of Tolman and for his protection. The situation is clearly analogous and simular to that provided for in Section 14-2-1 U.C.A., 1953, as amended. That section speaks specifically and directly about the rights of materialmen and laborers to recover under such a bond for the materials furnished or laborers performed.

The Utah Court has consistently recognized the necessity of time requirements established by statutes. This has

been true even if they have effectuated a hardship on the party against whom they are being construed. See Scarborough vs. Granite School District, Utah, 531 P.2d 480 (1975). The Court has also realized the necessity of strictly adhering to such limitations in bonding situations. In the 1966 case of American Oil Company vs. General Contracting Corporation, 17 Utah 2d 330, 411 P.2d 486, the Court strictly construed a 90 day bonding notice requirement. In the 1973 case of Carlisle vs. Cox, supra, the Court strictly construed this precise section. That case involved the belated delivery of heat register units for a building project. The Court recognized that Sections 14-2-1 and 14-2-2 applied and barred the plaintiff's claim even though a minor portion of the materials supplied by the plaintiff were supplied within the one year time period.

This defendant submits that the one year statute of limitations fully applies and that the plaintiff in this action is barred for failure to bring it timely against this defendant.

CONCLUSION

The plaintiff-appellant in this action had a remedy under the Miller Act which he had failed to avail himself

of. Since it failed to so act, Tolman, the general contractor, has no need for the indemnification provided for in the bond which is the subject of this suit.

The plaintiff-appellant did not file its claim within one year. As such, it does not have a remedy against the contractor of the contractor's surety under the Miller Act; nor does it have a cause of action against the surety of Clifford A. Prince (the Western Surety Company) under any other provision.

Respondents contend that this action is not appropriately brought in the state courts. It further contends that if it is properly brought in the state courts the opinion of Judge Croft in ruling that the one year statute of limitations still applies is correct. Respondent respectfully requests that the opinion of Judge Croft in the Third Judicial District be affirmed.

Respectfully submitted this 2nd day of February, 1976

TIM DALTON DUNN
HANSON, WADSWORTH & RUSSON
702 Kearns Building
Salt Lake City, Utah 84101
Attorney for Respondent
Western Surety Company

CERTIFICATE OF MAILING

Two copies of the foregoing Brief of Respondent Western Surety Company, Inc. were posted in the U. S. mail, postage prepaid, and addressed to the Attorney for Appellant, John W. Lowe, Esq. Brayton, Lowe & Hurley, 1011 Walker Bank Building, Salt Lake City, Utah 84111, on this 2nd day of February, 1976.

Sherlynn White

Sherlynn White, Secretary